No. 85-96

Office-Supreme Court, U.S.
FILED
JUN 29 1985
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1984

RICHARD AIELLO and JOHN F. MACAUDA,

Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

GERALD ALCH
11 Beacon Street
Boston, Massachusetts 02108
(617) 227-9852

ANTHONY M. CARDINALE
11 Beacon Street
Boston, Massachusetts 02108
Attorneys for Petitioners

2340
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRES THAT INDICTMENTS BE RETURNED BY AN UNBIASED GRAND JURY WHEN A STATE RESORTS TO A GRAND JURY PROCEDURE.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented For Review	iv
Opinion Below	v
Jurisdiction	v
Constitutional Provisions	vi
Statement of the Case	1
Argument	
I. The Supreme Judicial Court of Massachusetts Violated the Petitioners' Constitutional Right To Due Process By Holding That They Were Not Entitled To Be Indicted By A Grand Jury That Was Free From Bias Or Prejudice And Accordingly Refusing To Conduct Any Inquiry Into Whether The Grand Jury That Indicted Petitioners Was Biased Or Prejudiced Against Them	4
Conclusion	14

TABLE OF AUTHORITIES

CASES

SUPREME COURT

	Page
Beck v. Washington, 369 U.S. 541 (1962)	12
Costello v. United States, 350 U.S. 359 (1950)	10
Stirone v. United States, 361 U.S. 212 (1960)	9
United States v. Calandra, 414 U.S. 388 (1974)	9
United States v. Dionisio, 410 U.S. 1 (1973)	9, 12
United States v. Sells Engineering, Inc., ___ U.S. ___, 103 S.Ct. 3133 (1983)	9

CIRCUIT COURTS

United States v. Burke, 700 F.2d 70 (2nd Cir.), cert. denied, 104 S.Ct. 72 (1983)	10
United States v. Hyder, 732 F.2d 841 (11th Cir. 1984) . .	10

MASSACHUSETTS

Commonwealth v. McLeod,
394 Mass. 727 (1985) . . . . . v, 3

Commonwealth v. Monahan,
349 Mass. 139 (1965) 10

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRES THAT INDICTMENTS BE RETURNED BY AN UNBIASED GRAND JURY WHEN A STATE RESORTS TO A GRAND JURY PROCEDURE.

OPINION BELOW

A copy of the official opinion of the Supreme Judicial Court of Massachusetts, Commonwealth v. McLeod, 394 Mass. 727 (1985), is attached hereto as Appendix A. The Court's attention is respectfully directed to pages six through nine of the appendix in which the issue raised by this petition is discussed by the court below.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts sought to be reviewed was entered on May 8, 1985. Jurisdiction is conferred upon this Court by 28 U.S.C. Sec. 1257(3) to review the final judgment of the highest court of the state by writ of certiorari.

CONSTITUTIONAL PROVISIONS

The Fifth and Fourteenth Amendments to the United States Constitution are involved in this petition. The texts of those provisions are as follows:

> U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV:

1. Citzenship rights not to be abridged by states.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Stats and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 23, 1982, an altercation took place in the early morning hours at the King Arthur's Motel in Chelsea, Massachusetts between police officers from Everett and Chelsea and a group of civilians. One civilian, Vincent Bordonaro, died as a result of injuries he received during the incident.

The incident received a massive amount of publicity generated by the complainants themselves and their attorneys, all of which was extremely prejudicial. A grand jury investigation was thereafter commenced and on August 25, 1982, the petitioners were indicted, for the offenses of murder in the first degree, assault and battery by means of a dangerous weapon, assault by means of a dangerous weapon with intent to murder, and violations of civil rights.

The petitioners moved to dismiss the indictments on the ground that the grand jurors were biased and prejudiced against them in violation of their rights to due process as guaranteed them by the Fifth and Fourteenth Amendments, and requested that the court conduct an inquiry into the existence of bias and prejudice during the grand jury proceedings. The petitioners' motion was denied.

After a five week trial and six days of jury deliberations, the jury convicted the petitioner Aiello of second degree murder, assault and battery by means of a dangerous weapon, and violations of civil rights, and convicted petitioner Macauda of manslaughter, assault and battery by means of a dangerous weapon, and civil rights violations.

The petitioners timely filed an appeal of their conviction. The appeal was argued February 5, 1985, before the Supreme Judicial Court of Massachusetts. As one of their arguments on appeal, the petitioners contended that the trial judge had erred in denying their motion to dismiss the indictments and in failing to conduct any inquiry into the existence of bias and prejudice among the grand jurors. The judgments were affirmed on May 8, 1985. [Commonwealth v. McLeod, 394 Mass. 727 (1985), reprinted in Appendix A].

The petitioners currently remain incarcerated.

ARGUMENT

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHT TO DUE PROCESS BY HOLDING THAT THEY WERE NOT ENTITLED TO BE INDICTED BY A GRAND JURY THAT WAS FREE FROM BIAS OR PREJUDICE AND ACCORDINGLY REFUSING TO CONDUCT ANY INQUIRY INTO WHETHER THE GRAND JURY THAT INDICTED PETITIONER WAS BIASED OR PREJUDICED AGAINST THEM.

As hereinafter more fully set forth, the court below decided an important question of federal law which has not been, but should be, decided by this Court, i.e., whether the due process clause of the Fifth and Fourteenth Amendments requires that indictments be returned by an unbiased grand jury when a state resorts to a grand jury procedure.

At the hearing on the petitioners' motion to dismiss the indictments,

evidence was presented demonstrating the bias and prejudice of the grand jury. The evidence introduced included copies of articles about the incident which appeared in Boston Metropolitan and surrounding area newspapers, video tapes of television news coverage of the incident, and audio tapes of a radio talk show dedicated to the incident. A petitioner Macauda testified at the hearing about certain events that had occurred during the grand jury proceedings which were not reflected in the transcript. He testified that the grand jurors were speaking to each other, interrupting one another, shouting at him, shaking their heads and making threatening gestures. At one point a juror shouted at him: "Do you think we are idiots, that we don't understand?". He also testified that a juror abruptly and without permission,

left the grand jury room for a period of time, that the jurors were hostile to him, and that one juror made the comment, "they didn't have a chance". In addition, he testified that one of the jurors described the incident as "a massacre".[1]

The trial judge denied the petitioners' motion to dismiss, ruling as immaterial the issue of whether the grand jury was biased or prejudiced against the petitioners, since no such right was available to them under Massachusetts law. He recognized that an "attitude" prevailed among the jurors, but speculated that it might

---

[1] This latter statement was significant because it evidenced the prejudicial effect of the preindictment publicity on the grand jury in that the jurors were using the same word, "massacre", to describe the incident as was used by one of the complainants who had been so quoted in the newspapers.

have been caused by factors other than the massive prejudicial publicity in this case. In subsequently allowing the petitioners' motion for change of venue, however, the judge found a strong possibility of the existence of prejudice among members of the community due to the pretrial publicity in this case. Nevertheless he refused to conduct an inquiry into whether the grand jury was biased or prejudiced, despite the fact that the grand jurors had been summonsed from the very same community from which the trial had to be transferred due to prejudicial exposure of members of the community to publicity relating to this case, stating that the petitioners "[were] not entitled to be indicted by a grand jury which was free from bias or prejudice".

On appeal, the Supreme Judicial

Court of Massachusetts upheld the judge's refusal to conduct an inquiry into grand jury bais, holding that the petitioners were not entitled to a grand jury free from bias. It should be noted that the court, in examining the record before it, employed a standard whether the grand jury was tainted by "hatred or malice". It is unclear whether this standard was utilized as a test of due process, but assuming that it was, the petitioner contends that said standard is not in accord with the requirements of due process and imposes an insurmountable burden on a state defendant seeking to establish that his due process rights were violated. Quaere, how a showing of hatred or malice could ever be possible, given the court's refusal to conduct any inquiry into the existence of same on the basis

that petitioners had not made a prima facie showing of hatred or malice?

The function and responsibilities of the grand jury include both determining whether there is probable cause to believe a crime has been committed and protecting citizens against unfounded criminal prosecutions. United States v. Calandra, 414 U.S. 388 (1974); United States v. Sells Engineering, Inc., _____ U.S. ___ , 103 S.Ct. 3133 (1983). If the grand jury is to accomplish its function, it must be allowed to make its determination independently. United States v. Dionisio, 410 U.S. 1, 16 (1973). As stated in Stirone v. United States, 361 U.S. 212, 218-219 (1960), "the right to have the Grand Jury make the charge on its own judgment is a substantial right which cannot be taken

away." Thus, the Fifth Amendment has been interpreted to require in federal criminal prosecutions that indictments be returned by an unbiased grand jury. Costello v. United States, 350 U.S. 359 (1950) ("An indictment returned by a legally constituted and unbiased Grand Jury, like an information drawn by the prosecutor, if valid on its face is enough to call for a trial on the merits. The Fifth Amendment requires nothing more"). Id., at 363. See also, United States v. Hyder, 732 F.2d 841, 842 (11th Cir. 1984); United States v. Burke, 700 F.2d 70, 82 (2nd Cir.), cert. denied, 104 S.Ct. 72 (1983).

Massachusetts law imposes no requirement that grand jurors be free from bias or prejudice. See, e.g., Commonwealth v. Monahan, 349 Mass. 139, 154 (1965). That doctrine was adopted

at a time when media coverage was not nearly as pervasive as it is today and should be rejected as inconsistent with the principles of due process. Where the integrity of the grand jury proceedings has been impaired, the dismissal of indictments returned by the grand jury is warranted.

In the instant case, the pre-indictment publicity was inflammatory and highly prejudicial, consisting of both public opinion and personal commentaries, and was generated by the complainants themselves and their attorneys. The media coverage was intense, saturating the community from which the grand jurors were summonsed. It was amidst this atmosphere that the grand jury proceedings were commenced. As a result, the grand jurors, who had been exposed to the prejudicial

publicity, were so infected with bias and prejudice that their role of serving as a "protective bulwark standing solidly between the ordinary citizen and the overzealous prosector", [United States v. Dionisio, supra, at 17], was ignored as demonstrated by their open hostility toward the petitioners.

The existence of bias and prejudice among the grand jurors was amply demonstrated in this case. At the very least, a sufficient showing was made to warrant an inquiry into the existence of bias. The trial judge's refusal to conduct any such inquiry, [Compare, Beck v. Washington, 369 U.S. 541 (1962)], and the Supreme Judicial Court's approval of such inaction, resulted in a denial of the petitioners' right to an unbiased grand jury - a right, it is submitted, guaranteed by the due process clause of

the Fifth and Fourteenth Amendments.

Because the preindictment publicity in this case interfered with the grand jury's obligation to make its determination independently, free from bias or prejudice, the resulting indictments should have been dismissed. If a grand jury is allowed to make its determination based on bias or prejudice, then its "dual function of determining if there is probable cause to believe a crime has been committed and of protecting citizens against unfounded criminal prosecutions", [United States v. Dionisio, supra], is merely an illusory concept having no meaning. The grand jury in such circumstances becomes nothing more than a rubber stamp for the prosecutor.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

Gerald Alch Esq.
For Petitioner Richard Aiello
11 Beacon Street
Boston, MA 02108
(617)227-9852

Anthony M. Cardinale, Esq.
For Petitioner John T. Macauda
11 Beacon Street
Boston, MA 02108
(617)523-6163

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A.H. Smith

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240